Ipmuda Bhd v Bakitan Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D5–22–1420 OF 2006
HANIPAH FARIKULLAH JC
24 JUNE 2010

Contract — Sale of goods — Conditions and warranties — Breach of condition — Goods sold accepted by buyer — Whether buyer only entitled to treat breach of condition as breach of warranty — Sale of Goods Act 1957 s 13

Contract — Sale of goods — Sale by description — Breach of contract — Goods sold accepted by buyer — Whether buyer only entitled to damages for breach of warranty — Sale of Goods Act 1957 s 13

The plaintiff sold and delivered to the first defendant steel bars. On the first defendant's failure and/or refusal to pay for the bars, the plaintiff commenced a civil action against the defendants. The first defendant contended that the steel bars delivered by the plaintiff were undersized and not according to the specifications described in its purchase orders. The first defendant further claimed that the use of such undersized bars in one of its projects had caused cracks and defects to the walls of the building being constructed. As such the first defendant had to compensate the building owner thereby suffering losses. The first defendant thus counterclaimed against the plaintiff for damages arising from the plaintiff's delivery of steel bars that failed to substantially comply with the specifications ordered.

Held, dismissing the plaintiff's claim with costs and allowing the first defendant's counterclaim in part:

(1) In the instant case, the contract was a contract of sale of goods by description. Thus, when the first defendant specified in its purchase orders the specifications of the steels bars required, the steel bars delivered by the plaintiff to the first defendant had to match those specifications and could not be significantly undersized. The plaintiff had thus breached the contract with the first defendant when it supplied the undersized steel bars (see paras 56 & 59). *Arcos Ltd v EA Ronaasen & Son* [1933] AC 470 referred.

(2) By virtue of s 13 of the Sale of Goods Act, the first defendant was in a position to treat the breach of condition of the purchase orders as a breach of warranty. The first defendant having taken delivery of the steel bars must be held accountable to pay for those goods and the plaintiff was

entitled to sue for the price thereof. However, the first defendant, in view of the breach of warranty was entitled to pursue the matter further and claim for damages (see paras 60 & 62). *Universal Cable (M) Bhd v Bakti Arena Sdn Bhd & Ors* [2000] 3 CLJ 375 referred.

(3) On the evidence, the defects to the building's wall were due to the undersized steel bars supplied by the plaintiff. Thus the plaintiff was liable for the damages suffered by the first defendant (see para 70). *Universal Cable (M) Bhd v Bakti Arena Sdn Bhd* [2000] CLJ 375 followed; *Panglima Aces Sdn Bhd v Highway Brick Works (Serendah) Sdn Bhd* [2006] 3 CLJ 641 followed.

(4) In the instant case, the first defendant's dealing with the steel bars constituted an acceptance and thus it had lost its right to reject the bars. It was confined to its remedy in damages but it had failed to adduce proof of the RM188,505.15 damages it claimed to have suffered. Instead, the court found that the amount of damages the first defendant was entitled to was RM3,331.84 — based on the deductions it calculated in respect of the undersized steel bars. The plaintiff however had failed to prove its case on the balance of probabilities and its claim ought to be dismissed with costs (see paras 76–77 & 79–80). *Universal Cable (M) Bhd v Bakti Arena Sdn Bhd* [2000] 3 CLJ 375 followed; *MG Sheth & Ors v Lam Thye Co Ltd* [1954] MLJ 230 referred.

[Bahasa Malaysia summary

Plaintif menjual dan menghantar serah kepada defendan pertama bar keluli. Atas kegagalan dan/atau keengganan defendan pertama membayar bagi bar-bar tersebut, plaintif memulakan tindakan sivil terhadap defendan-defendan. Defendan pertama menghujah bahawa bar keluli yang dihantar serah oleh plaintif bersaiz kecil dan tidak mengikut spesifikasi yang dinyatakan di dalam arahan pembelian. Defendan pertama selanjutnya menghujah bahawa penggunaan bar yang kecil di dalam salah satu projeknya telah menyebabkan rekahan dan kecacatan kepada dinding bangunan yang sedang dibina. Oleh itu defendan pertama terpaksa membayar pampasan kepada pemilik bangunan tersebut dan dengan itu mengalami kerugian. Defendan pertama, oleh itu, membuat tuntutan balas terhadap plaintif untuk ganti rugi yang berbangkit daripada penghantar serahan bar keluli oleh plaintif yang gagal untuk mematuhi secara substansial dengan spesifikasi yang dipesan.

Diputuskan, menolak tuntutan plaintif dengan kos dan membenarkan sebahagian tuntutan balas defendan pertama:

(1) Di dalam kes ini, kontrak tersebut adalah kontrak untuk jualan barangan secara deskripsi. Oleh itu, apabila defendan pertama menetapkan di dalam arahan pembelian spesifikasi bagi bar keluli yang diperlukan, bar keluli yang dihantar serah oleh plaintif kepada defendan pertama

seharusnya menyamai spesifikasi tersebut dan tidak boleh lebih kecil dengan ketara. Plaintif oleh itu telah memungkiri kontrak dengan defendan pertama apabila membekalkan bar keluli yang kecil (lihat perenggan 56 & 59). *Arcos Ltd v EA Ronaasen & Son* [1933] AC 470 dirujuk.

(2) Mengikut s 13 Akta Jualan Barangan 1957, defendan pertama berada dalam kedudukan untuk menganggap kemungkiran syarat-syarat di dalam arahan pembelian sebagai kemungkiran waranti. Defendan pertama setelah menerima penghantaran bar keluli tersebut perlu diputuskan sebagai bertanggungjawab untuk membayar bagi barangan tersebut dan plaintif berhak untuk menyaman terhadap harganya. Walau bagaimanapun, defendan pertama, disebabkan oleh kemungkiran waranti berhak untuk meneruskan perkara tersebut dengan lanjut dan menuntut ganti rugi (lihat perenggan 60 & 62). *Universal Cable (M) Bhd v Bakti Arena Sdn Bhd & Ors* [2000] 3 CLJ 375 dirujuk.

(3) Di atas keterangan, kecacatan kepada dinding bangunan adalah disebabkan oleh saiz kecil bar keluli yang dibekalkan oleh plaintif. Oleh itu plaintif bertanggungjawab bagi kerugian yang dialami oleh defendan pertama (lihat perenggan 70). *Universal Cable (M) Bhd v Bakti Arena Sdn Bhd* [2000] 3 CLJ 375 diikut; *Panglima Aces Sdn Bhd v Highway Brick Works (Serendah) Sdn Bhd* [2006] 3 CLJ 641 diikut.

(4) Di dalam kes ini, urusan defendan pertama berkaitan dengan bar keluli tersebut merupakan penerimaan dan oleh itu ia kehilangan haknya untuk menolak bar-bar tersebut. Ia terbatas kepada remedi dalam ganti rugi tetapi ia gagal mengemukakan bukti kerugian RM188,505.15 yang diyatakan dialaminya. Sebaliknya mahkamah mendapati bahawa jumlah ganti rugi yang defendan pertama berhak adalah sebanyak RM3,331.84 — berdasarkan kepada pemotongan yang dikira berkenaan dengan bar keluli yang bersaiz kecil tersebut. Plaintif, walau bagaimanapun, gagal membuktikan kesnya atas imbangan kebarangkalian dan tuntutannya sewajarnya ditolak dengan kos (lihat perenggan 76–77 & 79–80). *Universal Cable (M) Bhd v Bakti Arena Sdn Bhd* [2000] 3 CLJ 375 diikut; *MG Sheth & Ors v Lam Thye Co Ltd* [1954] MLJ 230 dirujuk.]

Notes

For cases on sale of goods in general, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5121–5123.

Cases referred to

Arcos Ltd v EA Ronaasen & Son [1933] AC 470, HL (refd)
Guan Soon Tin Mining Co v Wong Fook Kum [1969] 1 MLJ 99, FC (refd)
Kokomewah Sdn Bhd v Desa Hatchery Sdn Bhd [1995] 1 MLJ 214, HC (refd)

Malaysian Rubber Development Corp Bhd v Glove Seal Sdn Bhd [1994] 3 MLJ 569, SC (refd)
MG Sheth & Ors v Lam Thye Co Ltd [1954] MLJ 230; [1954] 1 LNS 54, CA (refd)
Panglima Aces Sdn Bhd v Highway Brick Works (Serendah) Sdn Bhd [2006] MLJU 343; [2006] 3 CLJ 641, HC (folld)
Universal Cable (M) Bhd (7042-D) v Bakti Arena Sdn Bhd & Ors [2000] MLJU 106; [2000] 3 CLJ 375, HC (folld)

Legislation referred to
Companies Act 1965 s 218
Sale of Goods Act 1957 ss 13, 59, 59(2)

Malarchelvy a/p Nagappan (SN Fam & Co) for the plaintiff.
Han Li Meng (Lee Ong & Kandiah) for the defendants.

Hanipah Farikullah JC:

BACKGROUND FACTS

[1] The plaintiff is in the business of trading in building materials. On the other hand, the first defendant is in the business of construction specialising in high end patented prefabricated building system method known as O-Stable Panel System. The plaintiff's claims against the first defendant is for a sum of RM307,965.47 comprising of principal sum for the amount of RM263,559.98 and interest accrued on the principal sum for RM44,405.49 as at 31 August 2006, being the price of steel bars delivered upon the first defendant's request. The claims against the second, third, fourth and fifth defendants are as guarantors.

THE PLAINTIFF'S CASE

[2] It is the plaintiff's case that in 2001 there was an application for credit facility made by the first defendant to the plaintiff and in consideration of the plaintiff granting the credit facility, the second to fourth defendants have executed the letter of guarantee dated 29 November 2001 and the fifth defendant executed a letter of guarantee dated 10 November 2005.

[3] The plaintiff further averred that it sold and delivered steel bars in accordance to the first defendant's purchase orders and sent the invoices for the price of the goods sold and delivered to the first defendant for payment. The first defendant and/or it's representative at site has acknowledged receipt of the said goods sold and delivered by applying the company chop and signature on the delivery orders.

[4] Pursuant to the terms of the invoices sent by the plaintiff to the first defendant, the first defendant has agreed to settle the principal sum due and owing for the steel bars sold and delivered by the plaintiff within (60) days from the date the debt is accrued. The first defendant has agreed that the plaintiff is entitled to charge an interest at the rate of 1.5% per month on all outstanding sums from the date of expiry of the 60 days credit term until full settlement.

[5] The plaintiff alleged that the first defendant only made one part payment for the sum of RM7,268.40 on 28 October 2005. As at 15 November 2005 the balance outstanding sum due and owing by the first defendant to the plaintiff for the price of the steel bars delivered was RM263,559.98 and the interest accrued on the outstanding principal sum due and owing by the first defendant to the plaintiff was RM44,405.49 as at 31 August 2006.

[6] It is not disputed that on 13 March 2006, the first defendant wrote to the plaintiff stating that the steel bars received by the first defendant is different in quality from their purchase orders No 221792 and No 221794 ie there is an alleged shortage in the measurement of the steel bars received by the first defendant. The first defendant also attached a debit note No 10007 dated 13 March 2006 for the sum of RM3,331.84 being deductions calculated by the first defendant for the alleged shortage.

[7] The plaintiff contents that specifications of the goods in the said delivery order stated that the first defendant must examine the goods at the time of the delivery and that no complaints or return can be entertained after the acknowledgement of the delivery. It was further contended by the plaintiff that the first defendant or its agent at site has clearly acknowledged receipt of the said goods and as such is deemed to have examined the goods before receiving the same.

[8] On 15 March 2006 the plaintiff wrote to the first defendant to say that the steel bars ordered by the first defendant are 'CQ' bars ie bars of commercial quality which have no stringent quality and sizing as opposed to Malaysian Standard ('MS') steel bars. Therefore, according to the plaintiff the CQ bars are actually sold based on pricing and not on calculation. As such the plaintiff said it cannot accept the deductions made by the first defendant and requested the first defendant to deem the debit note dated 13 March 2006 as cancelled. The plaintiff, further stated in its letter dated 15 March 2006 that the first defendant could have returned the CQ bars and go for MS steel bars if it wished.

[9] Since, the plaintiff did not receive any reply or payment from the first defendant, the plaintiff wrote to the first defendant on 23 March 2006 to demand for the outstanding sum of RM290,944.29 as at 28 February 2006.

[10] The first defendant on 3 April 2006 wrote to the plaintiff to dispute the plaintiff's claim for RM290,944.29 on two items. The first was with regards to the supply of the steel bars and the first defendant's debit note for RM3,331.84. The second one is with regards to the supply of clay roof tiles for the sum of RM10,903.23. The first defendant has requested the plaintiff to issue a credit note for the total sum of RM14,235.07 for the said two items.

[11] Subsequently, the first defendant vide letter dated 3 April 2006 have admitted and agreed to settle the outstanding sum of RM290,944.29 less RM14,235.07 for the disputed items. This is clearly stated in the first defendant's letter dated 3 April 2006.

[12] According to the plaintiff they did not accept any deduction at all since the CQ bars are sold based on pricing and not sizing. As for the clay roof tiles, the manufacturers through its letter faxed to the plaintiff on 10 April 2006 have confirmed with plaintiff that they have discussed the same with the first defendant and both parties have agreed to the extent of damage to the tiles received by the first defendant. The plaintiff accordingly issued a letter dated 13 April 2006 to the first defendant with regards to the manufacturer's proposal and the first defendant have accepted the manufacturer's proposal. The plaintiff thereafter issued a credit note No 704922 dated 31 May 2006 for the sum of RM8,779.10 to the first defendant.

[13] As there was no payment from the defendant, the plaintiff subsequently issued a statement of account as at 31 August 2006 for the sum of RM307,965.47 to the first defendant. Thereafter, the plaintiff instructed their solicitor to proceed with the filing of the writ of summons in this action since they failed to receive any payment from the first defendant. The writ of summons was accordingly filed on 28 September 2006.

[14] In the meantime on 27 September 2006, the first defendant wrote to the plaintiff whereby the first defendant admitted to the outstanding sum due and owing to the plaintiff by the first defendant. The first defendant further agreed to pay the principal sum of RM263,559.98 and requested for a deduction of 30% on the interest accrued.

[15] The plaintiff counter proposed to the first defendant through their letter dated 4 October 2006 to accept the sum of RM263,559.98 in one lump sum and to grant a 10% discount of the interest amount, and the said settlement sum to be payable to the plaintiff on or before 30 December 2006.

[16] The plaintiff proceeded to obtain judgment in default in this court against the defendants on 3 May 2007 since the first defendant failed to settle the outstanding sum and/or appear in court to dispute the plaintiff's claim.

[17] On 9 May 2007, the first defendant wrote to the plaintiff again, admitting to the outstanding account with plaintiff and agreeing to settle the same after they receive the money upon disposing a property.

[18] On 1 June 2007 the plaintiff proceeded to issue a statutory notice under s 218 of the Companies Act 1965 through their solicitors to demand the judgment sum of RM343,673.58 as at 31 May 2007.

[19] The first defendant on 28 July 2007 wrote to the plaintiff to appeal to the plaintiff to withdraw the 218 notice on the grounds that the said notice will jeopardise the company's developments. On 22 August 2007, the first defendant wrote again to the plaintiff and enclosed cheques for the total sum of RM274,143.25 to settle the plaintiff's claim against the first defendant.

[20] The plaintiff however immediately on 24 August 2007 wrote to the first defendant stating that the plaintiff is not agreeable to accept the sum of RM274,143.25 as full and final settlement and returned the said cheques to the first defendant.

THE DEFENDANT'S CASE

[21] The defendant does not dispute that the plaintiff did indeed supply and delivered the materials ordered under the purchase orders. However in respect of the two purchase orders ie purchase order No 221792 and purchase order No 221794 dated 9 November 2005 and 10 November 2005 respectively for the purchase of Y10mm, Y12mm and Y16mm steel bars, the first defendant contends that the plaintiff had delivered steel bars that were not in accordance with the description stated in the aforesaid two purchase orders. In particular, the steel bars that were actually supplied and delivered by the plaintiff to the defendant were significantly undersized.

[22] According to the first defendant as a result of these undersized steel bars, the defendant sustained loss and damages as the wall panels that were constructed using these undersized steel bars subsequently gave rise to cracks and had to be rectified. This led the owner of the bungalow to deduct a sum of RM188,505.15 from the contract price with the first defendant.

[23] The defendant's case is that they are entitled to a counterclaim against the plaintiff for damages arising from the plaintiff's delivery of steel bars that

failed to substantially comply with the dimensions ordered. The case of *Panglima Aces Sdn Bhd v Highway Brick Works (Serendah) Sdn Bhd* [2006] 3 CLJ 641 was cited by learned counsel for the defendant to support the defendant right to claim for damages in the case where the defendant could no longer reject the goods delivered, having already used the same. Hence the first defendant contended that the plaintiff's claim should be confined to the sum of RM75,254.83 ie the sum of RM263,559.98 less the counterclaim of RM188,505.15. It is the defendant's case that the CQ bars supplied by the plaintiff were used for the construction of the bungalow in Kajang.

ISSUES

[24] From the facts set out the main issues requiring consideration are as follows:

(a) whether the plaintiff has defaulted the terms of the purchase order No 221792 and purchase order No 221794 when it supplied steel bars to the defendant;

(b) whether the plaintiff is liable to the first defendant for the losses arising from the defendant's use of the undersized steel bars; and

(c) whether the amount of RM188,505 was incurred by the first defendant as costs of rectification of the defective walls.

THE EVIDENCE

[25] Three witnesses gave evidence for the plaintiff. The first was How Guat Ngoh/Ann How, the manager sales services with the first plaintiff who admitted that the CQ bars that was were delivered to the defendant in respect of purchase order No 221792 and purchase order No 221794 dated 9 November 2005 and 10 November 2005 respectively were undersized and not in accordance with the description stated in the said purchase orders.

[26] PW1 gave evidence that on 3 April 2006 the first defendant wrote to the plaintiff to dispute the plaintiff's claims for RM290,944.29 on two items. The first was with regards to the supply of the steel bars and the first defendant's debit note for RM3,331.84. The second one is with regards to the supply of clay roof tiles for the sum of RM10,903.23. The first defendant has requested the plaintiff to issue a credit note for the total sum of RM14,235.07 for the above said two items.

[27] PW1 explained that with regards to the supply of steel bars, the plaintiff did not accept any deductions at all since the CQ bars are sold based on pricing and not sizing. As for the clay roof tiles, the manufacturers through its letter

faxed to plaintiff on 10 April 2006 have confirmed with plaintiff that they have discussed the same with the first defendant and both parties have agreed to the extent of damages to the tiles received by the first defendant. The plaintiff accordingly issued a letter dated 13 April 2006 to the first defendant with regards to the manufacturer's proposal and the defendant has accepted the manufacturers' proposal. The plaintiff there after issued a credit note No 704922 dated 31 May 2006 for the sum of RM8,779.10 to the first defendant.

[28] In cross-examination, PW1 confirmed that the tag on the steel bars state the size as stated in the delivery orders and with naked eyes no one can tell the differences without using a special instrument to measure the dimension. In cross-examination, she agreed that there is no reason for the first defendant to suspect that the specification is ambiguous.

[29] PW1 agreed in cross-examination that with regards to the steel bars the plaintiff did not accept any deduction at all since the 'CQ' bars are sold based on pricing and not sizing. PW1 explained that 'CQ' bars means 'Commercial Quality'. Commercial quality means the size of the steel bar and the quality of the steel bar there is no stringent measurement on this sizing and quality. Therefore according to PW1, it does not matter that the measurement of the steel bars that the plaintiff supply is not in accordance with the purchase order because it is 'CQ'.

[30] The meaning of CQ bars is further explained by PW2 who has 14 years of experience in the supply of steel bars. In cross-examination, PW2 said that CQ bars means the quality of the steel bars is of a lower standard then the MS steel bars.

[31] The defendant called two witnesses. The first was Mr Khoo Tian the managing director of the first defendant (DW1). The first defendant is in the business of construction specialising in high end patented prefabricated building system method known as O-Stable Panel System.

[32] According to DW1, on or about November 2005, the first defendant needed some building materials for the construction of a two storey bungalow in Kajang ('the bungalow') for Mr Kong Kin Khong. The first defendant therefore ordered some building material for the construction of the bungalow from the plaintiff, including some steel bars needed for the construction of the wall panels of the bungalow.

[33] DW1 testified that the defendant ordered some steel bars for the bungalow from the plaintiff as stated in purchase order No 221792 dated 9 November 2005 and purchase order No 221794 dated 10 November 2005.

According to DW1, not all the building materials were delivered to the first defendant as per the specification stated in the said purchase orders.

[34] DW1 told the court that for purchase order No 221794, the first defendant ordered 138 pieces of Y10mm x 12 meters folded CQ bars and 96 pieces of Y12mm x 12 meters folded CQ bars (Y10mm, Y12mm and Y16mm refer to the dimension of the cross-section of steel bar ordered). For purchase order No 221794, the first defendant ordered 54 pieces of Y16mm x 12m Folded HTD Bar. Y10mm, Y12mm and Y16mm refer to cross section of steel bar, the diameters being 10mm, 12mm and 16mm respectively.

[35] According to DW1 these steel bars were needed for the construction of the bungalow, more specifically, for the wall panels. He explains that steel bars served to provide the necessary tension strength to the wall panels so that the wall panels would not suffer any cracks during lifting for the construction of the bungalow. In addition, he said the specifications of the steel bars ordered are important to provide the 'tensional strength' to overcome the pressure to the wall panels during lifting.

[36] However, DW1 said he discovered that the steel bars delivered by the plaintiff were not of the correct sizes as ordered in the said purchase orders. The steel bars delivered by the plaintiff were undersized and hence the first defendant submitted that it become wholly inadequate for the specific purpose for the purchase.

[37] DW1 explained-in-examination in chief that the differences in the sizes are as follows:

Sizes requested by the first defendant	Sizes supplied By the plaintiff	Percentage Difference
Y10mm x 12 meters (Folded CQ Bar)	Y9.0mm x 12 meters	18.99%
Y16mm x 12 meters (Folded HTD Bar)	Y13.5mm x 12 meters	28.81%
Y16mm x 12 meters (Folded HTD Bar)	Y13.5mm x 12 meters	28.81%

[38] According to DW1, after receiving the steel bars from the plaintiff, the defendant used some of the steel bars to construct the wall panels of the bungalow. However, DW1 said that after the wall panels had been delivered to the site, the first defendant discovered cracks appearing on the wall panels of the bungalow. This prompted him to examine the sizes of the steel bars delivered by the plaintiff. Upon examination, DW1 said he discovered that the steel bars delivered by the plaintiff were not of the correct sizes and were undersized.

[39] DW1 testified that it is impossible to determine the actual sizes of the steel bars at the time of delivery with the 'naked eyes'. The sizes can only be determined by using engineering equipments. According to him these engineering equipments were not placed in the construction site because they are normally not needed there. DW1 also stated that since the sizes of the steel bars mentioned in the plaintiff's delivery order were the same as the said purchase orders there was therefore no reason for the defendant to suspect the sizes of the steel bars were in fact different from the sizes stated in the plaintiff's delivery order.

[40] The first defendant further averred that immediately after the first defendant discovered that the steel bars were different in dimension, the first defendant notified the plaintiff for a site investigation. Subsequently, DW1 with PW1, conducted a joint inspection at the factory site on 25 November 2005. DW1 confirmed that after the joint inspection, the plaintiff acknowledged that the steel bars were in fact undersized and were not the correct sizes in accordance with what the first defendant had ordered.

[41] DW1 stated that instead of compensating the first defendant for the losses caused by the faulty and undersized steel bars, the plaintiff informed the first defendant that the first defendant still has to pay for the steel bars because the steel bars had been used in the construction of the bungalow.

[42] DW1 testified that the first defendant had to rectify the cracks on the wall panels of the bungalow which were caused by the faulty and undersized steel bars and the owner of the bungalow, Mr Kong Kin Khong deducted RM188,505.15 from the contract price of the bungalow as compensation due to the defective wall panels. According to DW1, the first defendant had promised that by using its patented O-Stable Panel System, the wall panels would be clean and almost zero defect. DW1 confirmed that the first defendant therefore suffered a loss of RM188,505.15 due to the defective wall panels which were caused by the faulty and undersized steel bars delivered by the plaintiff.

EVALUATION OF THE EVIDENCE AND FINDINGS

[43] In coming to decision on the plaintiff's claim as well as the defendant's counterclaim, I have carefully perused the evidence adduced by both parties as well as the document tendered and relied on by them. I have also considered the written submissions and authorities submitted by the parties.

[44] From the pleadings and the evidence adduced, it is clear that the main issue to be considered is whether the first defendant has defaulted in the terms of the purchase orders.

(i) Whether the plaintiff has defaulted the terms of the purchase order No 221792 and purchase order No 221794 when it supplied steel bars to the defendant

[45] Two of these purchase orders ie purchase order No 221792 and purchase order No 221794 dated 9 November 2005 and 10 November 2005 respectively for the purchase of Y10 mm, Y12mm and Y16mm steel bars, the court finds that the plaintiff had delivered steel bars that were not in accordance with the description stated in the aforesaid two purchase orders.

[46] In particular, the steel bars that were actually supplied and delivered by the plaintiff to the defendant were significantly undersized. This fact is not disputed by the plaintiff who contends instead that the plaintiff was justified in supplying the undersized steel bars as the steel bars ordered stated as 'Commercial Quality' ('CQ') steel bars.

[47] As a result of these undersized steel bars, the defendant alleged that it sustained losses and damages as the wall panels that were constructed for the bungalow using these undersized steel bars subsequently gave rise to cracks and had to be rectified. This led the owner of the bungalow to deduct a sum of RM188,505.15 from the contract price with the defendant.

[48] DW1 in his evidence stated that the steel bars delivered by the plaintiff to the defendant's factory were significantly undersized. The computation for the steel bars delivered is stated in exh 'P6' (at p 34 of bundle 'B').

[49] The plaintiff never denied the calculation made by the defendant. In fact, sometime on 25 November 2005 just about ten days after the steel bars were delivered to the defendant's factory, the defendant had upon discovering that the steel bars delivered were undersized, conducted a joint inspection with PW1.

[50] According to DW1, at the joint inspection with PW1, he personally took the measurements of the steel bars and showed the same to PW1. This was later confirmed in writing vide the letter of the same date (at p 1 of bundle 'F').

[51] The plaintiff never disputed the contents of the defendant's letter on the measurement of the steel bars. In fact, in the plaintiff's reply to the defendant's letter dated 13 March 2006, the plaintiff merely stated that the 'CQ' bars pricing are based on pricing and not on calculation.

[52] This takes us to the question of the meaning to be ascribed to the acronym 'CQ' bars. According to PW1, 'CQ' means commercial quality and as a matter of practice in the industry, the dimensions of the steel bars supplied on

a 'CQ' basis need not be stringently followed. She said that the plaintiff was at liberty to supply steel bars which were smaller in size than the specified dimension stated in the order.

[53] However, PW1 was unable to produce any evidence to support her evidence. Neither was PW1 able to state the acceptable deviation in the specifications for the 'CQ' bars ordered.

[54] As a bid to prove their contention on the meaning of the 'CQ' bars, the plaintiff procured PW2, who was the plaintiff's supplier for the steel bars to give evidence. However, PW2 also could not provide any evidence in support of his evidence on the meaning of 'CQ' bars. In fact, during cross-examination PW2 conceded that it would be unreasonable for the 'CQ' bars to deviate too much from the specification stated.

[55] Learned counsel for the defendant submitted that the steel bars are a very important component in the construction industry as the steel bars are frequently used as reinforcement for the walls and concrete slabs. The proper dimensions must be used to ensure that the necessary 'tensional strength' is achieved.

[56] In this regard, it must be noted that the contract in this case is a contract of sale of goods by description. This being the case, when the defendant specified in their purchase orders the diameter of the steel bars as Y10mm, Y12mm and Y16mm, in my view what must be delivered to the defendant must be steel bars that correspond to such diameters and not something that are significantly undersized.

[57] In *Arcos Ltd v EA Ronaasen & Son* [1933] AC 470 at p 479, the House of Lords has this to say regarding sale of goods by description:

> It was contended that in all commercial contracts the question was whether there was a 'substantial' compliance with the contract: there always must be some margin: and it is for the tribunal of fact to determine whether the margin is exceeded or not. I cannot agree. If the written contract specifies conditions of weight, measurement and the like, those conditions must be complied with. A ton does not mean about a ton, or a yard about a yard. Still less when you descend to minute measurements does 1/2 inch mean about 1/2 inch. If the seller wants a margin he must and in my experience does stipulate for it. Of course by recognised trade usage, particular figures may be given a different meaning, as in a baker's dozen; or there may be even incorporated a definite margin more or less: but there is no evidence or finding of such a usage in the present case.

[58] Similarly, in the present case, the defendant in its purchase orders to the plaintiff had clearly stipulated specific diameters for the steel bars, the plaintiff

is bound to deliver the steel bars as specified and not something less. Even if it is true that by the description 'CQ' it means that there could be some margin, the court agreed with the first defendant's submission that such margin cannot be so significantly different to be as much as between 20–30% of the diameter specified in this case.

[59] For the reason aforesaid, the court finds that the plaintiff has indeed breached the contract with the first defendant when the plaintiff supplied to the first defendant the undersized steel bars.

[60] The court finds that by virtue s 13 of the Sale of Goods Act 1957 the first defendant was in a position to treat the breach of condition of the said purchase orders as a breach of warranty. Section 13 of the SGA state as follows:

(1) Where a contract of sale is subject to any condition to be fulfilled by the seller the buyer may waive the condition or elect to treat the breach of the condition as a breach of warranty and not as a ground for treating the contract as repudiated.

(2) Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, or where the contract is for specific goods of the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the contract express or implied to that effect.

(3) Nothing in this section shall affect the case of any condition or warranty the fulfilment of which is excused by law by reason of impossibility or otherwise.

[61] The law on the breach of warranty was explained by Abdul Malik J (as he then was) in the case of *Universal Cable (M) Bhd v Bakti Arena Sdn Bhd & Ors* [2000] MLJU 106; [2000] 3 CLJ 375 as follows:

> Now, when there is a breach of warranty, the contract remains in force and the first defendant as the buyer is restricted to a claim in damages. Section 12(3) of the SGA defines a warranty as a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated. section 12(4) of the SGA enacts that whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract.
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> The stipulation may be a condition, though called a warranty in the contract. Section 12(1) of the SGA enacts that a stipulation in a contract of sale with reference to goods which are the subject thereof may be a condition or a warranty. Thus, in order to satisfy the definition of a warranty, there must,first, be an agreement

between the parties, a promise that the representation is or will be true (*Behn v Burness* [1863] 3 B & S 751 at p 755; *Bentsen v Taylor, Sons & Co (2)* [1893] 2 QB 274 (CA); *Heilbut, Symons & Co Ltd v Buckleton* [1913] AC 30 (HL); *Oscar Chess Ltd v Williams* [1957] 1 All ER 325; [1957] 1 WLR 370 (CA); and *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd* [1965] 1 WLR 623 (CA). Secondly, the agreement must be collateral to the main purpose of the contract and it is for the purpose of transferring the property in and the possession of the goods of the description contracted for the buyer. The warranty is said to be collateral because the breach of it, unlike the breach of a condition, is not the breach of the whole consideration (*Wallis, Son and Wells v Pratt and Haynes* [1910] 2 KB 1003 at p 1012). Everything hinges on the contract. Whether a stipulation in a contract of sale is a condition the breach of which gives rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages, depends in each case on the construction of the contract itself (*Cehave NV v Bremer Handelsgesellschaft mbH, The Hansa Nord* [1976] QB 44, [1975]; [1975] 3 All ER 739 (CA); *Tradax International SA v Goldschmidt SA* [1977] 2 Lloyd's Rep 604; *Bremer Handelsgesellschaft mbH v Vanden Avenne – 1 zegem PVBA* [1978] 2 Lloyd's Rep 109 (HL); and *Bunge Corpn v Tradax SA* [1981] 2 All ER 513; [1981] 1 WLR 711 (HL)). As demonstrated, s 12 of the SGA expressly provides that a term essential to the main purpose of the contract where a breach of which will entitle the injured party to terminate the contract, or that a term is collateral to the main purpose of the contract where its breach gives rise only to a claim for damages.

[62] Applying the above authorities to the fact of the present case, the outcome would be as follows. The first defendant having taken delivery of the goods must be held accountable to pay for those goods and the plaintiff was entitled to sue for the price thereof. On the other hand, the first defendant, in view of the breach of warranty was entitled to pursue the matter further and claim for damages. This brings me to the issue of counterclaim by the first defendant.

(ii) Whether the plaintiff is liable to the first defendant for the losses arising from the defendant's use of the undersized steel bars

[63] I shall now examine whether the defects to the wall paneling were due to the undersized steel bars.

[64] As DW1 had said in his evidence, by the time the defendant discovered that the steel bars supplied were not in conformity with the specifications ordered, it was already too late for the first defendant to reject the goods as the first defendant had already used the same and erected the wall panels for the construction of the bungalow for its clients.

[65] According to DW1 the first defendant had purchased the steel bars only from the plaintiff and no one else. In addition, DW2 also confirmed that these steel bars were used for the bungalow.

[66] Further, when PW1 attended inspection of the steel bars at the first defendant's factory where the first defendant had casted the wall panels for the bungalow, PW1 said that she never see any other steel bars apart from the plaintiff's steel bars at the factory.

[67] It is not disputed that if the steel bars used were undersized, it would affect the tensional strength of the wall panels. Both PW1 and DW1 testified to this fact.

[68] DW2 was the engineer in charge of the construction of the bungalow undertaken by the defendant. He gave evidence that the cracks on the walls of the bungalow were caused by the undersized steel bars used for the wall panels. According to him the steel bars were used to provide the necessary tensile and flexural strength to the wall panels. He further testified that due to the significantly undersized steel bars, the wall panels were unable to withstand the stress exerted on the panels during their lifting.

[69] Counsel for the plaintiff had made a suggestion that the cracks on the wall panels could have been caused by other factors. However no evidence has been adduced in support of the same.

[70] Looking at the totality of the evidence adduced on this issue, I would accept the evidence of DW1 and DW2 that the defects to the wall paneling's were due to the undersized steel bars supplied by the plaintiff. Thus, there is no question that the steel bars used for the wall panels were those supplied by the plaintiff. Therefore the court finds that the plaintiff's is liable for the damages suffered by the first defendant. *Universal Cable (M) Bhd v Bakti Arena Sdn Bhd*'s case and *Panglima Aces Sdn Bhd v Highway Brick Works (Serendah) Sdn Bhd* applied.

(iii) Whether the amount of RM188,505 was incurred by the first defendant as costs of rectification of the defective walls

[71] The court will next deal with the issue of the amount of counterclaim by the first defendant.

[72] The defendant is in its counterclaim is claiming that as a result of the breach of the terms of the purchase orders the defendant suffered has suffered losses of RM188,505.15.

[73] In cross-examination, DW1 agreed that the sum of RM188,505.15 was the balance contract sum the house owner ought to pay the first defendant for the contract works. According the DW1, after the house was completed, the

house owner requested for some compensation since the first defendant promised 'zero defect' on the walls and that both the first defendant and the house owner agreed that the sum RM188,505.15 is to be treated as compensation to the house owner for the 'defective wall panel'. The house-owner, in any event was not called as witness to verify this fact. Further, DW1 expressly admitted that RM188,505.15 is not the cost of rectification but in actual fact it was the cost of compensation requested by the bungalow owner and agreed that there is no work-out on the actual cost of rectification at all.

[74] In the case of *Malaysian Rubber Development Corp Bhd v Glove Seal Sdn Bhd* [1994] 3 MLJ 569 His Lordship Mohamed Dzaiddin SCJJ (as then he was) in considering the quantum of damages for breach of goods held that it is trite that the plaintiff must prove the loss although the standard imposed on it is not a high one.

[75] The court in the case of *Kokomewah Sdn Bhd v Desa Hatchery Sdn Bhd* [1995] 1 MLJ 214 held that it is settled law where a plaintiff brings an action for damages, he must prove it. Before he can recover he has to discharge the burden of proving both as to the fact of damage and as to the amount. The High Court in deciding that referred to the decision in the case of *Guan Soon Tin Mining Co v Wong Fook Kum* [1969] 1 MLJ 99 where the Federal Court held as follows:

> The respondent, as plaintiff, of course had to discharge the burden of proving both the fact and the amount of damages before he could recover. Where he succeeded in proving neither fact nor amount of damage he must lose the action or, if a right was infringed, he would recover only nominal damages. Where he succeeded in proving the fact of damage, but not its amount, he would again be entitled to an award of nominal damages only. This statement of the law is concisely stated in *Mayne & McGregor on Damages* (12th Ed) para 174. For its practical application, I would quote Lord Goddard CJ in *Bonham-Carter v Hyde Park Hotel Ltd* [1948] WN 89:
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> > '... plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars and so to speak, throw them at the head of the court, saying, 'This is what I have lost; I ask you to give me these damages'. They have to prove it.

[76] After carefully considering the evidence adduced by witnesses for both parties and in the light of the documentary evidence tendered by the first defendant and the authorities cited above, regrettable the court finds that the first defendant failed to adduce evidence to proof the amount of damages and the figures of RM188,505.15 stated have not been substantiated.

[77] Alternatively, on the facts of this case, the court is of the view that the proper remedy available to the first defendant is counterclaim for damages under s 59 of the SGA in which he may sue the seller (ie plaintiff) for damages for breach of warranty. In the present case, the first defendant's dealing with the steel bars constituted an acceptance and therefore, it had lost its right to reject and was confined to its remedy in damages. *MG Sheth & Ors v Lam Thye Co Ltd* [1954] MLJ 230; [1954] 1 LNS 54; *Universal Cable (M) Sdn Bhd v Bakti Arena Sdn Bhd & Ors* [2000] MLJU 106; [2000] 3 CLJ 375.

[78] In the case of *Universal Cable (M) Bhd v Bakti Arena Sdn Bhd & Ors*, Abdul Malik J (as he then was) explained the law on damages for breach of warranty as follows:

> Thus, when the seller sues for the price of the goods, by s 59(1)(a) of the SGA, the buyer is entitled as a defence to set up the breach of warranty in diminution or extinction of the price. Furthermore, s 59(2) of the SGA makes it clear that if the buyer 'has suffered further damages', the buyer is not precluded from bringing a separate action for damages even though the buyer may have already set up the mechanism of a breach of warranty in diminution of the price. The case of *Mondel v Steel* (1841) 8 M & W 858 immediately comes to mind when one is confronted with a situation under s 59 of the SGA. In that case, a buyer purchased a ship. The ship was built and it discovered to be defective. When the seller sued for the price, the buyer set up, as a defence, the seller's breach of expenses warranty as to quality. At that stage, the buyer's damages were calculated on the basis of the difference the actual value of the ship at the date of delivery and its worth if built to the contractual standard. Later, when the buyer sued for further damages for the cost of repairs to the ship, the court held that, in relation to the earlier case, the buyer has defended himself and to that extent the buyer had obtained an abatement of the price on account of the breach. The court considered the buyer as received satisfaction for the breach of contract and was thus precluded from recovering in another action to that extent, and no more.

[79] Applying the above said authorities, in the present case, the court finds that amount of damages entitled by the first defendant is RM3,331.84. This finding is based on the first defendant letter dated 13 March 2006 to the plaintiff being deductions calculated by the first defendant for the alleged shortage in the measurement of the steel bars received.

CONCLUSION

[80] For the foregoing reasons, I am unable to conclude that the plaintiff has proved its case on the balance of probabilities. Therefore the plaintiff's claims is dismissed with costs.

[81] The court further finds that the defendant has failed to proof the amount of damages and the figures of RM188,505.15 which it alleges it has suffered. However by virtue of s 59(2) of the Sale of the Goods Act 1957 there is a breach of warranty by the plaintiff when it supplied undersized steel bars to the defendant. Therefore, the defendant has lost their right to reject the steel bars and were confined their remedy to damages. In this case, the court finds that the amount of damages entitled by the first defendant is RM3,331.84. This is based on the first defendant letter dated 13 March 2006 to the plaintiff. The plaintiff will also has to pay costs to the defendant as taxed by the registrar.

Plaintiff's claim dismissed with costs and the first defendant's counterclaim allowed in part.

Reported by Andrew Christopher Simon